RECORD AND BRIEFS

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In The Supreme Court of the United States

STATE OF FLORIDA,

Plaintiff,

v.

STATE OF GEORGIA,

Defendant.

SUPPLEMENTAL BRIEF FOR FLORIDA

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INTRODUCTION

The United States' amicus brief lays to rest Georgia's overwrought claims that Florida has brought this important action against the "wrong party, in the wrong court." Opp. 2. Cutting through Georgia's rhetoric and attempts to strain the rules of notice pleading, the United States not only recognizes that Florida's alleged injuries to the Apalachicola Region's ecology, economy, and way of life are "substantial" and "sufficiently pleaded," but that "Florida's complaint states a claim that fits squarely within this Court's original jurisdiction." U.S. Br. 15-17. So at this point, the only serious question before the Court is *how* Florida's action should proceed, not whether it is proper.

Pointing to the Master Manual update being undertaken by the U.S. Army Corps of Engineers (Corps), the United States suggests that the Court should simply "postpone" this properly pleaded action until the Corps has completed its update process—"expected" some three years hence. *Id.* at 9, 23. Not because the Manual update will resolve Florida's claims. The United States correctly recognizes (at 19) that the manual revision process will not—and cannot—resolve Florida's claims. Instead, the United States' interest in delay boils down to a desire to avoid "litigation distractions." *Id.* at 20. Such an interest is not sufficient to outweigh what the United States itself aptly recognizes as Florida's "substantial sovereign interest" in adjudicating a claim "squarely within" the Court's original jurisdiction. *Id.* at 14. And that is especially true where, as here, postponing a properly pleaded action would risk exacerbating possibly irreversible harms to natural resources.

In any event, the United States answers its own conundrum by recognizing that this Court may "account for [its] practical considerations" simply by "structur[ing]" the proceedings in a way that avoids interference with the manual revision process. *Id.* at 22. Allowing the action to proceed in such a structured fashion not only would accommodate the United States' practical concerns, but also Florida's "substantial sovereign interest" (*id.* at 14) in resolving its "equitable share" of interstate waters, which—as the United States agrees (at 16)—only this Court can do, through this action. Accordingly, the Court should grant Florida's motion for leave to file its Complaint, appoint a special master, and instruct the special master to proceed in a way that minimizes interference with the manual process.

ARGUMENT

I. THE UNITED STATES AGREES THAT FLORIDA HAS STATED A CLAIM THAT FALLS "SQUARELY WITHIN" THIS COURT'S ORIGINAL JURISDICTION

The United States' brief repudiates Georgia's arguments that Florida's Complaint fails to allege a claim within this Court's original jurisdiction. As the United States explains:

- "Florida asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court's original jurisdiction," *id.* at 14;
- Florida's "allegations are sufficient to form a properly framed equitable apportionment suit," *id.* at 15; *see also id.* ("[T]he alleged injuries to Florida's economy and ecology are sufficient to invoke this Court's original jurisdiction"); and

- "There is no alternative forum [to this Court] in which this precise legal dispute can be definitively resolved," *id.* at 16.

In short, under the traditional standards to which this Court looks in determining whether to invoke its exclusive original jurisdictional, "Florida's complaint presents a controversy of sufficient importance to invoke this Court's original jurisdiction." U.S. Br. 13-14; *see id.* at 17 ("Florida's complaint states a claim that fits squarely within this Court's original jurisdiction....").

II. THERE IS NO BASIS TO POSTPONE THE COMMENCEMENT OF THIS ACTION

As the United States observes, this "Court has recognized that it has 'a serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States.'" *Id.* at 14 (quoting *Arizona v. California*, 373 U.S. 546, 564 (1963)). Moreover, the Court's general "object in original cases" is to proceed as "promptly as possible," and avoid "delay [in] adjudication on the merits." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). This case—as the United States agrees (at 13-17)—presents a properly framed interstate water dispute within the Court's original jurisdiction. The United States has provided no reason for "postponing" this action for a period of several years, much less for "dismissing" it (even without prejudice). *Id.* at 22, 23.

A. Florida Has Adequately Alleged Grave Harms That Will Only Worsen In Time

At the outset, Florida—as the United States recognizes (at 15)—has adequately pleaded grave

injuries to its environment, culture, and economy. For example, Florida's Complaint alleges that:

- Decreased water flows will "jeopardiz[e] the viability of the Apalachicola Region's ecology, economy, and way of life," Compl. ¶ 7;
- Georgia's "upstream consumption is affecting threatened and endangered species and habitats along the Apalachicola River," *id.* ¶ 53;
- Reduced water flows have "precipitated a collapse of the Apalachicola Bay oyster population fishery, resulting in significant economic hardship to oystermen and others dependent upon oyster harvests," *id.* ¶ 54;
- If inflows continue to decrease (as forecasted), "the productivity of [Apalachicola Bay] will be irreparably harmed," *id.* ¶ 57;
- "Since 2006, thousands of threatened and endangered mussels have died as a result of low summer flows, the threatened Gulf sturgeon's sturgeon's spawning habitat has been rendered inaccessible, and habitat for freshwater fish spawning and recruitment, along with floodplain habitats, have been adversely affected," *id.* ¶ 58.
- "As Georgia's water uses grow, the amount of water entering Florida will continue to decrease, essential fish and wildlife habitats will constrict, and Florida will suffer additional irreparable harm," *id.* ¶ 59; and
- "The situation is dire and the need for relief immediate," *id.* ¶ 60.

The factual allegations supporting these injuries must be accepted as true at this preliminary stage.

See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). They underscore that postponing this action for several additional years would come at a grave and potentially irreversible cost for Florida's fish and wildlife, ecology, and economy. The situation can only worsen as Georgia's consumption increases.

B. The Manual Process Cannot—And Will Not—Resolve Florida's Claims

The United States bases its request to postpone this action on "practical considerations" (U.S. Br. 17)—namely, a parochial interest "in completing [the Corps'] Master Manual revision uninterrupted by continued litigation distractions," *id.* at 20. Putting aside whether an interest in avoiding "litigation distractions" can ever be sufficient to override this Court's "serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States," *Arizona*, 373 U.S. at 564, the government's practical concerns are deficient here.

Most fundamentally, the manual update process indisputably cannot resolve Florida's claims. This is true whether the manual process takes three months, three years, or, as is more in line with the Corps' prior experience in the projects to which it points, longer. *See* U.S. Br. 3-10 (recounting history of the Corps' ongoing efforts to revise operating protocols). The United States acknowledges this. As it forthrightly states—on page 19 of its brief:

> [T]he United States does not own the water in the [Apalachicola-Chattahoochee-Flint River Basin (ACF Basin)] and the Corps has no authority to apportion water among States or determine water rights. That is not a part of

> the manual revision process in which the Corps is engaged, and this Court is thus ultimately the appropriate body to address Florida's pending claims.

That admission should be the end of the matter.

Instead of allocating water rights among the States (which the Corps cannot do), the purpose of the Corps' manual update process is to define "*flow* regimes" for waters that reach federal reservoirs before Georgia consumes them. *Id.* at 17 (emphasis added). As the United States explains, the Corps' process only "include[s] a determination of whether and to what extent *storage* in Lake Lanier will be used to *accommodate* the present and future water supply needs of the Atlanta metropolitan area," consistent with the Corps' statutory responsibilities. *Id.* at 9 (emphasis supplied). This litigation is over Florida's equitable rights to the supply of water in the first place, not to the *manner* in which it happens to flow out of federal reservoirs. Ultimately, Florida's position is that Georgia is over consuming its equitable share of the water supply upstream. The manual process will not change that.

That is what the Corps itself told Congress. In 2005, the Principal Deputy Assistant Secretary of the Army (Civil Works)—who served from 2005-2009 as Assistant Secretary of the Army (Civil Works)—wrote to Senator Jeff Sessions to "clarify the Corps' intentions regarding updating of Water Control Plans" concerning the ACF Basin (*i.e.*, the Master Manual). Add. 1a. After reiterating that "[t]he Corps has no authority to grant water rights or to allocate water among several states," he explained that "[t]hese Water Control Plans are descriptive guides of current operations and conditions for

managing water flows and storage, *and not a prescription for allocating water supply*." *Id.* at 2a (emphasis added).

To the extent that the manual process could inform the relief ultimately awarded in this case, it is marginal and may be taken into account by the special master in entering a final remedial order. *See, e.g., New Jersey v. New York*, 283 U.S. 336, 348 (1931) ("This decree is without prejudice to the United States" and is subject to the authority of Congress and "the powers of the Secretary of War and Chief of Engineers of the United States Army"). But this action is many years—if not a decade plus—away from such a final determination.

C. Postponing This Action Would Depart Grossly From Ordinary Principles

This Court's "object" typically is to *avoid* delay in adjudicating properly framed original actions and to proceed "as promptly as possible." *Ohio*, 410 U.S. at 644. And because a stay of litigation can severely impact parties and their attempts to seek redress, a party ordinarily must satisfy a high standard to secure a stay of an action that otherwise is properly pleaded and before the courts, like the complaint in this case. *See Indiana State Police Pension Trust v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam) (discussing traditional stay factors). The United States does not even attempt to show that the traditional stay factors are met here—and they are not. Instead, the United States suggests that a stay would be appropriate under the "doctrine of primary jurisdiction." U.S. Br. 21. That is incorrect.

The primary jurisdiction doctrine applies where an agency has regulatory authority over the matter

in dispute—here, interstate water rights. *See United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956). Courts have invoked the doctrine where "the *precise question before the [court]* was one within the particular competence of an agency." *United States v. Phillip Morris USA Inc.*, 686 F.3d 832, 837 (D.C. Cir. 2012) (emphasis added); *see Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008) ("The [primary jurisdiction] doctrine is not designed to 'secure expert advice' from agencies 'every time a court is presented with an issue conceivably within the agency's ambit.'"); *Puerto Rico Mar. Shipping Auth. v. Valley Freight Sys., Inc.*, 856 F.2d 546, 549 (3d Cir. 1988) ("[T]he primary jurisdiction doctrine presupposes that the administrative agency to which referral is made has jurisdiction over the subject matter of the action"). The "precise question" before the Court here is whether Georgia is taking more than its equitable share of the interstate waters at issue. The United States itself admits (at 19) that the Corps lacks competence or jurisdiction to decide that issue.

Likewise, because the revised Manual cannot possibly resolve Florida's claims in this action, there is no "ripeness" problem with commencing this action. *Cf.* U.S. Br. 21. As discussed, the harms Florida faces are real and immediate. Florida has been seeking redress for those ongoing harms for more than a decade. *See id.* at 17. This action, in short, not only is ripe—but long overdue.

III. IN ANY EVENT, AS THE UNITED STATES RECOGNIZES, ITS "PRACTICAL" CONCERNS MAY BE MET SIMPLY BY STRUCTURING THE PROCEEDINGS

Nevertheless, as the United States recognizes (at 22), this Court can "account for the practical considerations" raised by the government by "structur[ing] equitable apportionment proceedings in a way that avoids or minimizes interference with or duplication of the manual revision process" and allows for consideration of the revised Manual.

As the United States observes (at 17), "[a]n equitable apportionment of an interstate river basin is not a simple undertaking. The factual issues involved can implicate complex matters of hydrology, geology, engineering, and economics, applied to great expanses of varied terrain and water uses." That is certainly true here. Factual development alone will be extensive, and could easily remain ongoing in 2017, when the Corps "expects" a final updated manual to be released. Whatever additional light the ongoing revision process could shed on this case (*cf.* U.S. Br. 19), there is no reason to postpone the discovery that *the parties* will seek to take. And discovery is just one part of the process. Equitable apportionment actions often involve threshold motions, summary judgment proceedings, trials, and remedial proceedings, as well as orders that may result in this Court's review. There is no reason to believe that an apportionment action as complex as this one will not proceed at a conventional pace, which would extend the litigation well beyond 2017.

Notably, Georgia has requested an opportunity to file a "motion to dismiss the complaint" on various

legal grounds. Opp. 31 n.20. Recent practice illustrates that it can take *years* to adjudicate such motions alone. *See, e.g.*, *Texas v. New Mexico,* No. 141 Orig. (motion to dismiss not yet decided three years after initial filing of case); *South Carolina v. North Carolina,* No. 138 Orig. (seven years to resolve preliminary issues relative to intervention); *Montana v. Wyoming,* No. 137 Orig. (three years for resolution of preliminary issues); *Nebraska v. Wyoming,* No. 108 Orig. (nine years to complete discovery and motion practice). There is no reason to defer consideration of Georgia's threshold legal objections while the manual process is underway.

Moreover, the proceedings could be structured so that the initial phase of the litigation focuses on the Flint River Basin alone. As the United States explains (at 23), "there are no federal projects on the Flint." *See* Opp. App. 1a (map). So "if Georgia did not file pretrial motions, or if such motions were resolved before the Corps has finished its administrative process, the parties could conduct discovery on the Flint pending the Corps' completion of the Master Manual revision." U.S. Br. 23.

A special master would be well-equipped and positioned to ensure that the initial phases of this litigation do not interfere with the manual process, and to structure the proceedings to allow full consideration of the Corps' input. The United States also would be free, as it suggests (at 20-21), to participate "in these proceedings as amicus curiae" or seek to intervene, and could bring any relevant matters to the attention of the special master. This approach would accommodate Florida's "substantial sovereign interest" in this action, *id.* at 14, while

allowing the action to proceed in a manner consonant with the government's practical interests.

Although the United States recognizes (at 22) that this structured approach could "account for the practical considerations" it raises in its brief, the government tepidly concludes—with scant reasoning to back it up—that, "on balance . . . postponing the proceedings until after the Corps' administrative process is complete would be the *preferable* course." *Id.* at 22-23 (emphasis added). The government has not come close to justifying the extraordinary and unnecessary step of postponing the *commencement* of this critically important litigation. The only reason it gives (at 23) for "prefer[ring]" that course is that "the need for and scope of any equitable decree" could be "more fully evaluated in light of the Corps' decisions about project operations in the Basin." But to the extent the revised Manual has any bearing on the "equitable decree" adjudicating Florida's rights, it may be taken into account as the action proceeds in the structured manner discussed above.*

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* It would be especially inappropriate to dismiss this action, even without prejudice. The State's motion for leave to file a complaint is fully briefed and this Court now has the United States' views that Florida's Complaint meets the traditional requirements for the exercise of the Court's original jurisdiction. It would be a waste of the time and resources of all concerned, including this Court, to require the State to refile another motion for leave to initiate this action—and give Georgia another opportunity to unduly delay this action even further. Moreover, the United States itself professes (at 22) that there is "little practical difference" between dismissing the action without prejudice, or staying it. At a bare minimum, the Court should grant Florida's motion for leave and stay the case.

* * * * *

Georgia's overconsumption of interstate waters in the ACF Basin is crippling the environment, ecology, and economy of the Apalachicola region—creating a "dire" situation for Florida and its residents. Compl. ¶ 60. The United States recognizes (at 17) that Florida's Complaint "fits squarely within this Court's original jurisdiction," and that only this Court can adjudicate the State's claims and order an equitable apportionment. *Id.* at 16. And the United States recognizes (at 22-23) that its "practical" concerns with respect to the manual process can be "account[ed] for" by structuring this action to avoid interference with that process. There is, accordingly, no reason to delay any further the commencement of this critically important action.

CONCLUSION

The Court should grant Florida's motion for leave to file its Complaint, appoint a special master, and advise the special master to conduct the proceedings in a way that minimizes potential interference with the manual process.

Respectfully submitted,

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ADDENDUM

ADDENDUM

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[25 Apr 2005]

[SEAL] [SEAL]

Reply to
Attention of

The Honorable Jeff Sessions
United States Senate
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Washington, DC 20510

Dear Senator Sessions:

This is in response to your letter of April 14, 2005, addressed to LTG Carl A. Strock, Chief of Engineers, regarding the U.S. Army Corps of Engineers' (Corps) handling of matters pertaining to the Alabama-Coosa-Tallapoosa (ACT) and the Apalachicola-Chattahoochee-Flint (ACF) river basins. I appreciate the opportunity to address the concerns raised in your letter and to clarify the Corps' intentions regarding updating of Water Control Plans.

As noted in your letter, the Department of Justice recently filed a Notice of Proposed Actions with the U.S. District Court, Northern District of Alabama, Eastern Division. Among other things, the Notice explains to the Court, and interested parties, the need to update the Water Control Plans for the ACT and ACF river basins. It is not the Government's intention to preempt a court ruling on the ACT and ACF issues

(nor could the updates have such an effect in my view). Prior to filing the Notice, the Commander of the Corps' South Atlantic Division communicated with the Governors of the States of Alabama, Florida, and Georgia letting each know of the intended filing and the need to update the Water Control Plans. The States of Alabama and Florida, in pleadings filed with the U.S. District Court, Northern District of Alabama, Eastern Division, complained of the lack of current Water Control Plans for these river basins. The Corps, in updating the Water Control Plans, is addressing these complaints. The Corps is required to update these Plans in accordance with internal regulations and Federal law.

Updating these Water Control Plans to reflect current operations as they have evolved due to changing conditions in the basins is not intended to address or resolve the issues related to water supply for North Georgia or resolve the water rights issues among the States. The Corps has no authority to grant water rights or to allocate water among several states. These Water Control Plans are descriptive guides of current operations and conditions for managing water flows and storage, and not a prescription for allocating water supply. Further, these updated Water Control Plans will not allocate or reallocate water rights within the ACT and ACF river basins.

I appreciate fully that water continues to be withdrawn from Lake Lanier for municipal and industrial water supply. Inclusion of these withdrawals and any discussion of them in the updated Water Control Plans, and corresponding NEPA documentation, will not confer any temporary, permanent, or vested rights in these waters. In fact, the updated Water Control Plans will acknowledge the lack of current contracts

for certain withdrawals, and will accurately report that such Water Control Plans do not serve as a de facto allocation, reallocation, or apportionment of water rights.

The interests of the Corps are to carry out its responsibilities under the law as it pertains to the stewardship of congressionally authorized water resources projects in the ACT and ACF river basins, Consistent with those interests, the Settlement Agreement in the *Southeastern Federal Power Customers, Inc.* case, referred to in your letter, was intended to establish only interim water storage contracts to assure that the Water Supply Providers paid appropriately, in accordance with Corps regulations, for the storage space being utilized for water withdrawals from Lake Lanier. The Settlement Agreement was the culmination of court-ordered mediation. It was never the Corps' intention to vest any new or additional water rights in the Water Supply Providers as was expressly recognized in the Settlement Agreement.

I appreciate that the State of Alabama is of the view that this Settlement Agreement had a baleful influence on the conclusion of allocation agreements under the Compact. I feel confident this result was in no way intended by the Corps, and I am anxious to work with you in an effort to bring the States back together to address these issues.

I emphatically disclaim any purpose on the part of the Army to legitimize through interim water storage contracts any water rights in Georgia that Alabama and Florida regard as illegitimate. Moreover, I assure you that the Corps will operate federal projects in the ACT and ACF river basins consistent with all Congressional authorizations, specific and general,

and will strive to strike the most appropriate balance of project purposes. I am fully committed to involving all the States fully and fairly in a transparent and collaborative update process for these Water Control Plans.

Very truly yours,

/s/ John Paul Woodley, Jr.
John Paul Woodley, Jr.
Principal Deputy Assistant Secretary of the Army
(Civil Works)